Office-Supreme Court, U.S.
FILED
JUL 16 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1083

FINLEY McADOO PAINTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 314 F. 2d 939.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1963. On April 4, 1963, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 10, 1963 and the petition was filed on May 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied his right to have the jury consider his defense of having acted upon the advice of counsel.

2. Whether the evidence supports the verdict.

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on a five-count indictment charging the use of mail, radio, and television in execution of a scheme to defraud (18 U.S.C. 1341, 1343). Petitioner was sentenced to sixty-eight months imprisonment and a fine of $5000. The conviction was affirmed on appeal.

1. The scheme charged involved false representations as to the assets of Credit Discount Corporation, a corporation controlled by petitioner, for which he was soliciting investments through radio, television, and newspaper advertising. The advertising promised interest at rates of 8 and 12 percent on investments "secured" by corporate notes or "corporate note and collateral" (Tr. 34–36, 65–70).[1] In response to the advertising, a number of prospective investors came to the office of the corporation and were told of various assets purportedly owned by the corporation. These representations were made by petitioner's office manager, by petitioner's brother, and in one instance by petitioner himself (Tr. 117).

Four investors were told that the corporation owned property known as the "Peck Farm" which the corporation was going to develop as a real estate project

[1] "Tr." refers to the two volume transcript of the trial in the District Court, which we have lodged with the Clerk of this Court.

(Tr. 101, 106, 117, 129).[2] In fact no part of the Peck Farm was ever conveyed to Credit Discount and it was never petitioner's intention that this corporation would own the farm (Tr. 429–430, 433, 610–611, 628, 639, 644). The farm did come under the ownership of other corporations controlled by petitioner (Tr. 393, 373, 668, 618, 429) and was ultimately conveyed to a sister-in-law of petitioner, who held title as of the date of trial (Tr. 489, 700). The office manager of Credit Discount—who was also indicted and had pleaded guilty—testified that he had been instructed by petitioner to tell investors that Credit Discount owned the farm (Tr. 282). Petitioner told the manager that, since title to the farm was actually in Credit Realty, another corporation controlled by petitioner, the Credit Discount investors could not reach this asset (Tr. 284). The manager explained that the similarity in names between Credit Discount and Credit Realty was deliberate so that investors would believe that the two corporations were the same and that the assets of Realty were those of Discount (Tr. 282–283).

Three investors testified that, when they went to the office of Credit Discount in December 1959, they were told that the corporation owned a theater (Tr. 106, 129, 137). On February 9, 1960, the corporation acquired a theater property which had been damaged by fire and had not been operated as a theater for several years (Tr. 369–370; 685–686). Prospective

[2] A fifth investor-victim testified to representations of ownership of "Kyle Field" (Tr. 137) which appears to be another name for the Peck Farm (Tr. 129).

investors were also told that the corporation was in the business of discounting automobile paper (Tr. 90, 106, 130–131). In fact, the corporation never engaged in the discounting of any automobile paper (Tr. 595–596).

In total, the investors contributed an aggregate of $24,000 to petitioner's corporation (Tr. 736–739). Although the corporation did pay interest from time to time, totalling $1,978.40 (Tr. 739), only one investor ever received even a partial repayment of principal (Tr. 79, 86, 92, 95, 103, 110, 120, 131, 136, 142, 149, 737–738).

2. Pauley, an attorney who had represented petitioner in the incorporation of both Credit Discount and Credit Realty (385–391), was called by the defense. In connection with Credit Discount's solicitations, he had examined some "memoranda pertaining to advertising" and suggested certain deletions which he believed were made (Tr. 388). Pauley's testimony did not indicate that he was ever consulted with respect to the more specific and personal misrepresentations involved in this case.

ARGUMENT

1. Reliance upon the advice of counsel is relevant as a defense only where a specific intent to violate the law on which counsel has rendered advice is a necessary element of the crime. Here, even if petitioner had relied upon the advice of his counsel that his conduct was not in violation of any federal statute, this would no more constitute a defense than would ignorance of the law. Petitioner intended to deceive

investors by representations which he knew to be untrue. This was the only element of *mens rea* necessary for violation of the federal mail and "wire" fraud statutes; a specific intent to violate these federal statutes is not an additional element of the crime.

Moreover, there is no evidence that petitioner's counsel advised him with regard to the crucial misrepresentations in the present case. Neither petitioner nor Pauley, the attorney, ever testified to any consultations or advice regarding the misrepresentations as to the ownership of particular assets which induced the investors to part with their money.

In any event, petitioner's present contention that the trial court should have incorporated a specific instruction on the effect of reliance on the advice of counsel comes too late. The judge fully instructed on the question of fraudulent intent and good faith (Tr. 823–824) and, following the instructions, petitioner's trial counsel stated: "Your Honor, the defendant has no exception; we think he has covered the law and was very fair" (Tr. 834). Accordingly, petitioner cannot now complain that the instruction should have been more detailed. Rule 30, F.R. Crim. P.

2. Petitioner contends that the evidence to support his conviction was insufficient because his advertising, stating that the investment would be "secured by corporate notes," was truthful since corporate notes were given (Pet. 5–6). This argument ignores the advertising which referred to additional collateral (Tr. 35). In fact there was virtually no collateral. Moreover, the phrase—"secured by corporate notes"—

would suggest to an ordinary reader that there was far more in the way of security than the bare issuance of notes by a corporate shell.

Finally, even if all the advertising were innocent on its face, the advertising was utilized as a step in the execution of a scheme to defraud. It functioned as bait to lure the victims to the office where a number of misrepresentations were made. Hence the alleged innocuous nature of the advertising is no defense to the charge of using interstate communication facilities in execution of a scheme to defraud. As this Court said in *Badders* v. *United States*, 240 U.S. 391, 394, involving a mail fraud prosecution, "Intent may make an otherwise innocent act criminal, if it is a step in a plot." See also *Durland* v. *United States*, 161 U.S. 306, 315. Accordingly the courts have held that the relative innocence of mailed matter is immaterial where the mailing is a functional part of the scheme to defraud. *Holmes* v. *United States*, 134 F. 2d 125, 134 (C.A. 8), certiorari denied, 319 U.S. 776; *Stephens* v. *United States*, 41 F. 2d 440 (C.A. 9), certiorari denied, 282 U.S. 880; *United States* v. *Schaefer*, 299 F. 2d 625, 629, certiorari denied, 370 U.S. 917.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1963.

U. S. GOVERNMENT PRINTING OFFICE: 1963